

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DALE ALAN SMITH,

Defendant-Appellant.

UNPUBLISHED

May 22, 2003

No. 236863

St. Joseph Circuit Court

LC No. 00-010339-FC

Before: Saad, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant was charged with one count each of conspiracy to commit murder, MCL 750.316; MCL 750.157a; first-degree murder, MCL 750.316; accessory after the fact to a felony (first-degree murder), MCL 750.505; and (4) possession of a firearm during the commission of a felony, MCL 750.227b. The jury acquitted defendant of first-degree murder, but found him guilty on the remaining counts. The trial court sentenced defendant to concurrent terms of life imprisonment for conspiracy to commit murder and forty to sixty months' imprisonment for accessory after the fact, consecutive to a two-year term of imprisonment for felony-firearm. Defendant appeals as of right. We affirm.

Defendant challenges the sufficiency of the evidence supporting his conspiracy to commit murder conviction. A challenge to the sufficiency of the evidence requires us to determine "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). Circumstantial evidence, and reasonable inferences arising from it, may be sufficient to prove the elements of a crime. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

A conspiracy occurs when two or more persons conspire to commit an act prohibited by law. MCL 750.157a. Obviously, murder is an act prohibited by law. MCL 750.316. A conspiracy to commit murder requires proof that at least two persons intended to murder another. *People v Boose*, 109 Mich App 455, 468; 311 NW2d 390 (1981). "To establish such intent, there must be knowledge of the unlawful purpose of murder." *Id.* The *Boose* panel further opined:

The gist of the offense of conspiracy lies in the unlawful agreement between two or more persons. Direct proof of agreement is not required, nor is it necessary

that a formal agreement be proven. It is sufficient if the circumstances, acts, and conduct of the parties establish an agreement in fact.

Furthermore, conspiracy may be established, and frequently is established by circumstantial evidence, and may be based on inference. [*Id.* at 468-469, quoting *People v Atley*, 392 Mich 298, 311; 220 NW2d 465 (1974), overruled on other grounds by *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).]

Conspiracy is a specific intent crime. *People v Izarras-Placante*, 246 Mich App 490, 493; 633 NW2d 18 (2001), quoting *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993).

Here, Ron Hostetter testified that he, Lisa Dolph-Hostetter, and defendant were involved in planning the victim's murder. His testimony suggested that the murder went according to plan. He also testified that defendant shot the victim. Viewing this testimony in a light most favorable to the prosecution, there was sufficient evidence establishing defendant's conviction for conspiracy to commit murder. *Nowack, supra* at 399.

Defendant contends that the jury verdict was inconsistent because defendant was acquitted of first-degree murder. Indeed, if the jury completely believed Hostetter, they could have also found defendant guilty of murder. Consistent with CJI2d 3.6(1), the trial court instructed the jury that, in weighing a witness's credibility, it was "free to believe all, none or part of any person's testimony." Thus, the jury may have found that Hostetter testified truthfully about the planning of the murder, even though it was not convinced that Hostetter testified truthfully that defendant shot the victim. Indeed, defendant's statements suggested that he participated in some conversations regarding the murder, even though he minimized his role. The jury may have found defendant's statements to be evidence supporting Hostetter's testimony that defendant was involved in the planning of the murder. In the absence of any other evidence to support Hostetter's testimony that defendant was the one to shoot the victim, the jury may have simply found that there was reasonable doubt as to that particular fact.

Defendant also contends that there was insufficient evidence establishing that Hostetter and defendant intended to kill the victim. In other words, even if Dolph-Hostetter intended to kill the victim, there was insufficient evidence that more than one person conspired with the specific intent to kill the victim. Again, however, Hostetter testified that he, Dolph-Hostetter, and defendant were involved in planning the murder. In addition, Hostetter testified that defendant attempted to make a light bulb bomb—presumably an alternate method of killing the victim. Thus, there was sufficient circumstantial evidence for the jury to infer that defendant specifically intended for the victim to be killed. *Avant, supra* at 505. Accordingly, defendant's challenge to the sufficiency of the evidence is without merit.¹ *Nowack, supra* at 399.

Defendant also contends that the trial court abused its discretion in denying his motion for a mistrial. We review a trial court's denial of a motion for a mistrial for an abuse of

¹ We further note that the information states that the conspiracy to commit murder occurred on or about February 19, 1996; accordingly, we reject defendant's challenge to the date specified in the complaint.

discretion. *People v Alter*, 255 Mich App 194, 205; ___ NW2d ___ (2003). Generally, a “mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant . . . and impairs his ability to get a fair trial.” *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). However, “an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial.” *Id.*

Here, the prosecutor specifically instructed the witness on the record (but outside of the jury’s presence) not to testify about hearing a gunshot when he was upstairs. During the witness’s testimony, the prosecutor established that the witness woke up and went downstairs. When the prosecutor asked the witness what he heard, instead of testifying about the conversation that he overheard while downstairs, the witness’s testimony inexplicably referenced hearing the gunshot while upstairs. Under the circumstances, we conclude that the witness’s answer was unresponsive. *Haywood*, *supra* at 228. Regardless, the trial court went to great lengths to instruct the jury in a manner to minimize the potential for unfair prejudice and ensure that defendant received a fair trial. Consequently, we are not persuaded that the trial court abused its discretion in denying defendant’s motion for a mistrial. *Alter*, *supra* at 205.

Finally, defendant contends that the verdict was inconsistent and the product of jury compromise or confusion.² While the jury’s verdict was somewhat inconsistent because it apparently believed only portions of Hostetter’s testimony, we again note that there was additional evidence supporting Hostetter’s testimony that defendant was part of the conspiracy to kill the victim. In contrast, there was no other evidence supporting Hostetter’s testimony that defendant killed the victim. Moreover, the jury’s verdict indicates that it followed the trial court’s instructions by properly considering defendant’s guilt on each of the charged offenses separately. Further, the jury’s questions to the trial court while deliberating suggest that the jury’s confusion, if any, was brought to the trial court’s attention and properly addressed. Finally, we note that the concept of jury compromise is not relevant where, as here, there was sufficient evidence to support defendant’s conviction for the greatest charged offense—murder.³ See *People v Ramsey*, 422 Mich 500, 514-516; 375 NW2d 297 (1985); *People v Malach*, 202 Mich App 266, 273-274; 507 NW2d 834 (1993). Consequently, defendant has failed to establish “plain error,” as necessary to avoid forfeiture of this issue. *Carines*, *supra* at 763-765.

Affirmed.

/s/ Henry William Saad
/s/ Patrick M. Meter
/s/ Donald S. Owens

² Defendant concedes that this issue is forfeited because it was not raised below; thus, defendant is not entitled to relief unless he can show a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999).

³ Viewed in a light most favorable to the prosecution, Hostetter’s testimony was certainly sufficient to convict defendant of murder. *Nowack*, *supra* at 399.